89

(2)

No. 07-756

FILED
APR 7 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

YI QIANG YANG, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
DONALD E. KEENER
SONG E. PARK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Q62 24P

QUESTION PRESENTED

Whether the court of appeals erred in holding that a person who is not legally married to a person who was forced to undergo an abortion pursuant to a coercive population control policy, but participated in a traditional marriage ceremony with that person, is not automatically eligible for "refugee" status under 8 U.S.C. 1101(a)(42).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 19

TABLE OF AUTHORITIES

Cases:

C-Y-Z-, In re, 21 I. & N. Dec. 915 (B.I.A. 1989) .... *passim*
Chang, In re, 20 I. & N. Dec. 38 (B.I.A. 1989) 2
Chen v. *Ashcroft*, 381 F.3d 221 (3d Cir. 2004) 5, 12, 13
Gamero, In re, 14 I. & N. Dec. 674 (B.I.A. 1974) 12
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999) 12, 18
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 2
INS v. *Elias-Zacarias*, 502 U.S. 478 (1992) 2, 19
Lin v. *United States Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007), petition for cert. pending, No. 07-639 (filed Nov. 13, 2007) 5, 14, 16
Lu v. *Gonzales*, 199 Fed. Appx. 552 (7th Cir. 2006) 16
Ma v. *Ashcroft*, 361 F.3d 553 (9th Cir. 2004) 14, 15
National Cable & Telecomm. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967 (2005) 15, 18
S-L-L-, In re, 24 I. & N. Dec. 1 (B.I.A. 2006), aff'd *sub nom. Lin* v. *United States Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007), petition for cert. pending, No. 07-639 (filed Nov. 13, 2007) ..... *passim*

Cases—Continued: Page

Shi v. *Attorney Gen.*, No. 06-1952 (3d Cir. July 27, 2007) 16
Shi, In re, No. 95 476 611 (Immigr. Ct. Nov. 8, 2004) 17
Tang v. *Gonzales*, 489 F.3d 987 (9th Cir. 2006) 16
United States v. *United States Gypsum Co.*, 333 U.S. 364 (1948) 18
Zhang v. *Gonzales*, 434 F.3d 993 (7th Cir. 2006) 14, 15

Convention, statutes and regulations:

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 4
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 601(a), 110 Stat. 3009-689 ..... 2, 3
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 1
8 U.S.C. 1101(a)(42) ..... *passim*
8 U.S.C. 1101(a)(42)(A) 2
8 U.S.C. 1182(a)(6)(C)(i) 4
8 U.S.C. 1182(a)(6)(C)(ii) 4
8 U.S.C. 1182(a)(7)(A)(i)(I) 4
8 U.S.C. 1252(b)(4)(B) 19
8 C.F.R.:
Section 1003.1(d)(3)(i) 18
Section 1003.1(h)(i) 16

Miscellaneous: Page

Att'y Gen. Order No. 2905-2007 (Sept 4, 2007) 17

Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *China: Profile of Asylum Claims and Country Conditions* (Apr. 14, 1998) 5

H.R. Rep. No. 469, 104th Cong., 2d Sess. (1996) 3

In the Supreme Court of the United States

No. 07-756

YI QIANG YANG, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 494 F.3d 1311. The decisions of the Board of Immigration Appeals (Pet. App. 35a-38a) and the immigration judge (Pet. App. 39a-58a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2007. On October 30, 2007, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including December 6, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Attorney General

may grant asylum to an alien who qualifies as a "refugee" under 8 U.S.C. 1101(a)(42). A "refugee" is a person who is unable or unwilling to return to his or her native country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. 1101(a)(42)(A); see *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992); *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.5 (1987).

In 1989, the Board of Immigration Appeals (BIA) rejected an asylum applicant's claim that implementation of China's "one couple, one child" policy, even if it results in the applicant's involuntary sterilization, is persecution or creates a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *In re Chang*, 20 I. & N. Dec. 38, 44 (B.I.A. 1989).

In 1996, Congress amended the INA's definition of "refugee" to include the following:

> [A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.

8 U.S.C. 1101(a)(42); see Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 601(a), 110 Stat. 3009-689;

see also H.R. Rep. No. 469, 104th Cong., 2d Sess. 173 (1996) (stating that IIRIRA § 601(a), 110 Stat. 3009-689, was enacted in response to the *Chang* decision).

The BIA has held that the spouse of a person who has been forced to undergo an abortion or sterilization may qualify for asylum under the revised definition of "refugee" in 8 U.S.C. 1101(a)(42). See *In re C-Y-Z-*, 21 I. & N. Dec. 915, 917-918 (B.I.A. 1989) (en banc). But the BIA has limited that rule to asylum applicants who are legally married and who opposed the spouse's abortion or sterilization. See *In re S-L-L-*, 24 I. & N. Dec. 1, 3-8 (B.I.A. 2006) (en banc), aff'd *sub nom.*, *Lin* v. *United States Dep't of Justice*, 494 F.3d 296, 314 (2d Cir. 2007), petition for cert. pending, No. 07-639 (filed Nov. 13, 2007).

In particular, the BIA has declined to extend asylum eligibility to boyfriends and fiancees of those who are subject to coercive population control practices, explaining that "the sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried father." *S-L-L-*, 24 I. & N. Dec. at 9. For the same reasons, the BIA also has declined to extend asylum eligibility to applicants who were not married legally but participated in traditional marriage ceremonies with a person forced to undergo an abortion or sterilization. *Id.* at 12. The BIA has noted, however, that unmarried partners may establish asylum eligibility by demonstrating that they have been or will be persecuted for *their own* resistance to a coercive population control program. *Id.* at 10; see 8 U.S.C. 1101(a)(42) ("[A] person * * * who has been persecuted * * * for other resistance to a coercive population control program, shall be deemed

to have been persecuted on account of political opinion.").

2. Petitioner, a native and citizen of the People's Republic of China, entered the United States illegally in 2001. Pet. App. 40a. He sought admission to the United States by presenting a false United States passport. *Ibid.* When interviewed by an immigration officer, petitioner stated that he was single, that he had no children, and that his only fear about being returned to China was that he "might be put in jail" because he did not have a passport. *Id.* at 2a, 19a, 37a-38a, 53a.

Petitioner was placed in removal proceedings and was charged with being inadmissible under 8 U.S.C. 1182(a)(6)(C)(i), for having attempted to procure entry into the United States by fraud or by willful misrepresentation of a material fact; under 8 U.S.C. 1182(a)(6)(C)(ii), for having falsely represented himself to be a United States citizen; and under 8 U.S.C. 1182(a)(7)(A)(i)(I), for not possessing or presenting the proper documentation for admission. Pet. App. 39a-41a. Petitioner conceded removability on the third charge, and an immigration judge (IJ) found that he was removable on the basis of the other two charges as well. *Id.* at 40a-41a, 43a.

Petitioner sought asylum, withholding of removal, and protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85. Pet. App. 40a. Through his application and in-court testimony, petitioner stated he feared he would be arrested if he returned to China because of his opposition to family planning regulations. *Id.* at 46a-47a. He stated that he had married Hui Ling Jiang in a traditional ceremony conducted by relatives when he was 21

and she was 17. *Id.* at 50a-51a. Because they both were underage, they could not be legally married, and without a marriage license, they were not permitted to have children. *Id.* at 47a-49a.[1] Petitioner stated that Jiang became pregnant and was forced by local family planning officials to have an abortion. Pet. App. 48a. Petitioner stated that he confronted family planning officials and argued with them, and he claimed that a subpoena was issued for him to appear at the public security bureau. *Id.* at 3a, 48a-49a. Petitioner then left China and entered the United States with the assistance of a smuggler, leaving his purported wife behind. *Id.* at 41a, 50a.

The IJ denied petitioner's application for asylum, withholding of removal, or CAT protection. Pet. App. 39a-58a. Importantly, the IJ made an adverse credibility determination, finding that petitioner's testimony was not at all "convincing" or "believable" and noting that petitioner "change[d] his story as he went along when he was confronted with inconsistencies and the answers he had already given to questions." *Id.* at 55a-57a. Specifically, the IJ found that petitioner gave inconsistent explanations for how his false passport was obtained and whether he knew of its falsity. *Id.* at 55a.

The IJ also found that petitioner's testimony about his purported traditional marriage ceremony was not

---

[1] In China, those who marry below the minimum age of marriage may not have their marriage legally registered by the government. See *Lin* v. *United States Dep't of Justice*, 494 F.3d 296, 326 n.13 (2d Cir. 2007). Under Chinese law, the minimum age for marriage is 22 for men and 20 for women. See *Chen* v. *Ashcroft*, 381 F.3d 221, 223 n.1 (3d Cir. 2004). The minimum ages are set higher under some local laws. See Bureau of Democracy, Human Rights and Labor U.S. Dep't of State, *China: Profile of Asylum Claims and Country Conditions* (Apr. 14, 1998).

credible, explaining that petitioner "stated that he was single upon his arrival in the United States." Pet. App. 53a. The IJ noted that petitioner failed to produce documentation from village officials attesting to the marriage, any letters or affidavits from his wife's family, or any photographs of the marriage ceremony, and the IJ pointed out an inconsistency regarding the claimed date of the marriage. *Id.* at 52a, 56a. The IJ thus concluded that, as a factual matter, petitioner "failed * * * to prove that he and this person he describes as his wife entered into a traditional marriage." *Id.* at 53a; see *id.* at 56a-57a.

The IJ also rejected petitioner's asylum claim because, even if he had established that he did participate in a traditional marriage ceremony, he would not be entitled to relief under the definition of "refugee" in the INA. Pet. App. 54a-57a. The IJ noted that petitioner was not legally married under Chinese law and only spouses who are legally recognized are deemed eligible for asylum under the "spousal eligibility rule" set forth in *S-L-L-* and *C-Y-Z-*. *Id.* at 54a.

Finally, the IJ rejected petitioner's claim that he had been persecuted, or shown a likelihood of future persecution, on account of his confrontation with population control authorities. Pet. App. 54a. The IJ noted that petitioner "did not present any evidence to show that he suffered any serious injuries" or that he "was arrested or detained or that he suffered any harm at the hands of the Chinese government." *Ibid.* And the IJ determined that petitioner "failed to present consistent and sufficient evidence to establish that anyone in China is look-

ing for him on account of a protected ground." *Id.* at 54a-55a.[2]

3. The BIA affirmed. Pet. App. 35a-38a. It first decided that the IJ correctly determined that petitioner is not eligible for asylum based on his purported wife's forced abortion because an application "must have entered into a legally recognized marriage in order to be considered a spouse" within the meaning of *S-L-L-* and *C-Y-Z-* and petitioner had not entered into a legal marriage. *Id.* at 36a. The BIA then determined that petitioner failed to show that he suffered or will suffer persecution due to "other resistance to a coercive population control program," *id.* at 36a (quoting 8 U.S.C. 1101(a)(42)), finding no "clear error" in the IJ's conclusion that petitioner's testimony about confronting local officials and the subsequent subpoena were not credible, *id.* at 36a-37a.

4. The court of appeals dismissed petitioner's petition for review in part and denied it in part in a per curiam opinion. Pet. App. 1a-17a. The court first held that, even assuming that petitioner's testimony was true, petitioner could not be deemed eligible for asylum as the spouse of a person forced to undergo an abortion. *Id.* at 10a-13a. The court deferred to the BIA's decision in *S-L-L-* that only legally married applicants are eligible for asylum, concluding that the BIA's interpretation of the statute was reasonable and thus was due *Chevron* deference. *Id.* at 10a-13a. The court explained that

---

[2] The IJ also rejected petitioner's claims for withholding of removal and protection under the CAT. Pet. App. 57a-58a. The BIA likewise rejected those claims. *Id.* at 38a. The court of appeals rejected petitioner's withholding claim and found that petitioner abandoned his CAT claim. *Id.* at 7a n.1 & 17a. Petitioner does not renew either of those claims before this Court.

"legal marriage reflects a sanctity and long-term commitment that other forms of cohabitation simply do not," and that a "legal husband * * * shares significantly more responsibility in determining, with his wife, whether to bear a child in the face of societal pressure and government incentives." *Id.* at 12a. Indeed, the court stated, "'it would be absurd to characterize reliance on marital status * * * as arbitrary and capricious'" when "benefits and presumptions based on marriage are found in so many other areas of the law." *Ibid.* (citation omitted). Because petitioner conceded that he is not legally married, the court concluded, he "cannot claim refugee status under the provision in § 1101(a)(42) that 'a person who has been forced to abort a pregnancy . . . shall be deemed to have been persecuted on account of political opinion.'" *Id.* at 13a.

The court also held that petitioner failed to establish refugee status based on his own "resistance to a coercive population control program." Pet. App. 13a-17a (quoting 8 U.S.C. 1101(a)(42)). Even assuming that all of petitioner's testimony was true, the court explained, he had not established past persecution or a likelihood of future persecution, because petitioner "was not detained for any length of time," "suffered no physical injuries from his encounter with family planning officials," and faced "little risk of physical violence for having opposed the family planning laws if returned to China." *Id.* at 16a. The court thus affirmed the BIA's holding that petitioner had not established eligibility for asylum. *Id.* at 17a.

ARGUMENT

The court of appeals correctly determined that an applicant who participates in a traditional marriage cer-

emony, but is not legally married, is not automatically deemed eligible for asylum if his partner is forced to undergo an abortion. Although there is disagreement on that issue in the courts of appeals, the issue is not ripe for review at this time, for two reasons. First, the decisions that have extended asylum eligibility to persons who are not legally married but participated in traditional marriage ceremonies have been called into doubt by the BIA's recent decision in *S-L-L-*. Second, the Attorney General has recently certified a related decision to himself to revisit the BIA's "spousal eligibility rule." It would be premature for this Court to review the question presented now, before giving the courts of appeals an opportunity to consider the BIA's decision in *S-L-L-* and the decision to be rendered by the Attorney General on certification.

In any event, this case is not a suitable vehicle for resolving the question presented, because petitioner could not take advantage of the "spousal eligibility rule" even if it were extended to persons who were not legally married but had participated in a traditional marriage ceremony. The IJ found that petitioner was not credible and had not actually participated in a traditional marriage ceremony. Because this Court's resolution of the question presented would have no effect on the ultimate disposition of this case, further review is unwarranted.

1. The court of appeals correctly determined that an applicant who contends that he was married in a traditional ceremony to a person later forced to undergo an abortion is not automatically eligible for asylum under the INA. The relevant statutory provision provides that "a person who has been forced to abort a pregnancy or to undergo involuntary sterilization * * * shall be deemed to have been persecuted on account of political

opinion." 8 U.S.C. 1101(a)(42). Contrary to petitioner's contention (Pet. 19-20), the plain text of the statute does not compel the conclusion that a person who participated in a traditional ceremony with a person forced to abort a pregnancy is deemed to have been persecuted. The court of appeals recognized as much, noting that even the BIA's determination that *legally* married spouses may qualify under that provision was based "not on anything Congress explicitly said in § 1101(a)(42)" but on the BIA's interpretation of the statute. Pet. App. 11a.

The agency has made clear its view that the statute does not extend to participants in traditional marriage ceremonies, and the court of appeals correctly held that that view is entitled to deference.[3] In *S-L-L-*, the BIA recently reaffirmed the "spousal eligibility rule' it adopted in *C-Y-Z-*, stating that, "[a]lthough there is no specific reference in the statutory definition of a refugee to a husband's claim based on harm inflicted upon his wife, the general principles regarding nexus and level of harm apply in determining such a claim." 24 I. & N. Dec. at 5. It noted that Chinese law "imposes joint responsibility on married couples for decisions related to family planning," and "[a] married couple may be subjected to social ostracism and pressures from Government officials," "threatened with fines," have "their property * * * damaged or confiscated," and one or both spouses may be "threatened with demotion, job

---

[3] This case does not raise the question whether the BIA's spousal eligibility rule is entitled to deference, because the court of appeals assumed the validity of that rule. See Pet. App. 11a-12a. Thus, the only question before the Court is whether the BIA's refusal in *S-L-L-* to extend the rule to an applicant who participated in a traditional marriage ceremony is reasonable.

loss, or other economic sanctions for refusing to agree to an abortion." *Id.* at 6-7.

The BIA limited its holding to *legal* marriages. It stated in *S-L-L-* that its decision in *C-Y-Z-* "relies on marriage as the linchpin," because "the sanctity of marriage and the long term commitment reflected by marriage place the husband in a distinctly different position from that of an unmarried father." 24 I. & N. Dec. at 8-9. The BIA explained: "In the absence of a legal marriage, evaluating the existence of the requisite nexus is problematic, both as to whether the applicant was, in fact, the father of the child and as to whether local officials considered him responsible, or were even aware of his involvement." *Id.* at 9-10. For example, if the unmarried partner of a woman forced to undergo an abortion were deemed eligible for asylum, "[p]roof or presumption of paternity * * * may be considerably more difficult." *Id.* at 10.

Petitioner is mistaken in suggesting (Pet. 21-22, 27 n.5) that the BIA did not consider the case of a participant in a traditional marriage ceremony in *S-L-L-*. The BIA made clear that "the holding in *Matter of C-Y-Z-* is limited to *legally married* spouses." 24 I. & N. Dec. at 10 (emphasis added). The BIA specifically noted, and rejected, the argument that a person who was "denied permission to marry and bear a child based on the minimum age requirements of the Chinese family planning law" should be deemed eligible for asylum, stating that the BIA "require[s] that an applicant have entered into a *legally recognized marriage* in order to be considered a spouse within the meaning of *Matter of C-Y-Z-*." *Id.* at 12 (emphasis added); see *id.* at 12 n.14 (distinguishing the situation of "an underage couple [that] has entered into a traditional marriage ceremony"). The BIA has

thus already rejected petitioner's claim (Pet. 24) that "'traditional marriage' and 'legally sanctioned marriage' are indistinguishable."

Because the agency charged with interpreting the statute has clearly stated its view that a person who participated in a traditional marriage ceremony should not automatically be deemed eligible for asylum under the statutory provision at issue, the only question is whether that determination is reasonable and thus entitled to deference. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (BIA's reasonable construction of the INA is entitled to *Chevron* deference). That determination is reasonable and entitled to deference, for two reasons.

First, as the court of appeals noted, the BIA's reliance on marital status is appropriate because "benefits and presumptions based on marriage are found in so many other areas of the law and in other provisions of the [INA]." Pet. App. 12a (citing *S-L-L-*, 24 I. & N. Dec. at 9; *Chen* v. *Ashcroft*, 381 F.3d 221, 227 n.6 (3d Cir. 2004)). The BIA's longstanding rule is that "the validity of a marriage" for immigration purposes "is determined according to the law of the place of celebration." *In re Gamero*, 14 I. & N. Dec. 674, 674 (B.I.A. 1974). In this context, the legal marriage requirement "contributes to efficient administration and avoids difficult and problematic factual inquiries," because legal marriages in China "can often be proven easily and reliably through objective documentary evidence such as marriage certificates or household registration booklets." *Chen*, 381 F.3d at 228 (internal quotation marks omitted). The BIA therefore reasonably decided that a person who has not legally married may not be deemed to have been

persecuted based on his partner's forced abortion. *Id.* at 227.

Second, a legally married couple occupies a fundamentally different position in society than a couple that is not married. As the court of appeals explained, "[a] legal husband, at least in the eyes of the government, shares significantly more responsibility in determining, with his wife, whether to bear a child in the face of societal pressure and government incentives." Pet. App. 12a. In contrast, "[a]n underage couple living in an unregistered de facto marital relationship [that] is not recognized as a married couple by the Government * * * do[es] not have the legal rights and obligations of a married couple." *S-L-L-*, 24 I. & N. Dec. at 12 n.13. For that reason, the BIA may reasonably use marital status as "a rough way of identifying a class of persons whose opportunities for reproduction and child-rearing were seriously impaired or who suffered serious emotional injury as the result of the performance of a forced abortion or sterilization on another person." Pet. App. 12a-13a (quoting *Chen*, 381 F.3d at 227).

The court of appeals thus correctly deferred to the BIA's determination that a legally unmarried partner of a person forced to undergo an abortion is not automatically deemed to have been persecuted on the basis of political opinion under 8 U.S.C. 1101(a)(42). Petitioner concedes that he is not legally married, Pet. 9, and therefore he is not eligible for relief under the "spousal eligibility rule" in *C-Y-Z-* and *S-L-L-*. See Pet. App. 36a. Even if petitioner had been married in a traditional ceremony (a fact the IJ refused to find because she determined that petitioner's testimony was not credible, Pet. App. 53a), petitioner would not be eligible for asylum under the text of the statute or the BIA's interpretation

of it in *S-L-L-*.[4] The court of appeals therefore correctly rejected his claim.

2. Petitioner contends that review is warranted because the Seventh and Ninth Circuits have held that participants in traditional marriage ceremonies may be deemed refugees under the BIA's spousal eligibility rule, while the court below and the Second Circuit have held that such persons may not be deemed refugees. Pet. 12-17 (citing *Zhang* v. *Gonzales*, 434 F.3d 993, 999 (7th Cir. 2006); *Ma* v. *Ashcroft*, 361 F.3d 553, 561 (9th Cir. 2004); and *Lin* v. *United States Dep't of Justice*, 494 F.3d 296, 300 (2d Cir. 2007), petition for cert. pending, No. 07-639 (filed Nov. 13, 2007)). Although there is some disagreement in the circuits on this issue, review is not appropriate at this time.

As the court of appeals explained, the decisions in *Zhang* and *Ma* are of "little persuasive value" because they pre-dated the BIA's decision in *S-L-L-*, which was the first published BIA decision explicitly to limit the application of the spousal eligibility rule to an applicant who is legally married. Pet. App. 13a; see also *S-L-L-*, 24 I. & N. Dec. at 12. The court explained that, because the text of the statute does not unambiguously provide that a person who marries a person forced to abort a pregnancy is deemed to have been persecuted, the court

---

[4] Although an unmarried partner of a person forced to undergo an abortion or sterilization is not eligible for asylum on the basis of his relationship with the person persecuted, he or she may be eligible for asylum based on his or her *own* "resistence to a coercive population control program." 8 U.S.C. 1101(a)(42); see *S-L-L-*, 24 I. & N. at 10-11. Although petitioner made such a claim below, the IJ, BIA, and court of appeals rejected it, Pet. App. 13a-17a, 36a-37a, 54a-55a, and petitioner does not renew it before this Court. The claim therefore has been abandoned.

must consider whether the BIA's interpretation of the statute in *S-L-L-* was reasonable under *Chevron*. Pet. App. 12a- 13a. Because the BIA's legal marriage requirement is reasonably based on the different rights and responsibilities of legally married couples as opposed to unmarried couples, the court of appeals correctly deferred to it. See *ibid.*

The Seventh and Ninth Circuits may well reconsider their decisions in *Zhang* and *Ma* in light of the recent decision in *S-L-L-*. Neither court analyzed the text of the INA and determined that the plain language compelled extension of asylum eligibility to persons married in traditionally ceremonies. Rather, both the *Zhang* and *Ma* courts cited *C-Y-Z-*, which did not distinguish between legal and traditional marriages, and determined that interpretation of the statute to include traditional marriages would further a legislative policy of providing protection to partners of persons who underwent forced abortions and sterilizations. See *Zhang*, 434 F.3d at 999, 1001; *Ma*, 361 F.3d at 559. In *S-L-L-*, however, the BIA made clear that its spousal eligibility rule does not extend to participants in traditional marriage ceremonies and provided a detailed explanation for why Congressional policy does *not* favor extension of the statute to unmarried partners. See 24 I. & N. Dec. at 5-7, 10-12. Because the decisions in *Zhang* and *Ma* did not turn on a determination that was compelled by the plain terms of the statute, the Seventh and Ninth Circuits may well reverse course in light of *S-L-L-*. See *National Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005) (agency is entitled to deference unless "the prior court decision h[eld] that its construction follows from the unambiguous terms of the statute and

thus leaves no room for agency discretion").[5] Review by this Court at this time thus would be premature.

Moreover, review of the question presented also would be premature because the Attorney General is now considering whether the agency's position should be modified. In *Lin* v. *United States Department of Justice*, 494 F.3d 296 (2007), the Second Circuit rejected the BIA's spousal eligibility rule, holding that the statutory provision conferring refugee status on asylum applicants who have been subjected to involuntary sterilizations or abortions does not provide the spouses of such persons with a per se entitlement to refugee status.[6] The Third Circuit then issued a *sua sponte* briefing order in another case, *Shi* v. *Attorney General*, No. 06-1952 (3d Cir. July 27, 2007), slip op. 1, suggesting that it wished to revisit the spousal eligibility rule. In response, the Attorney General directed the BIA to refer the agency's decision in *Shi* to him so that he could review the spousal eligibility rule. See 8 C.F.R. 1003.1(h)(1)(i).

---

[5] Contrary to petitioner's suggestion (Pet. 15), neither the Seventh Circuit nor the Ninth Circuit has considered the impact of the BIA's decision in *S-L-L-* on their own prior decisions. Petitioner cites (Pet. 15) two cases decided in those circuits after *S-L-L-*, but the briefing in both cases was completed before the decision in *S-L-L-*, no party brought *S-L-L-* to either court's attention, and neither of the decisions even mentioned *S-L-L-*. See *Tang* v. *Gonzales*, 489 F.3d 987, 990-991 (9th Cir. 2007) (citing *C-Y-Z-* but not *S-L-L-*); *Lu* v. *Gonzales*, 199 Fed. Appx. 552, 554 (7th Cir. 2006) (unpublished) (same). Moreover, the asylum applicant in *Lu* did not participate in a traditional marriage ceremony, so the question whether the statute includes those who participate in traditional marriage ceremonies was not even presented in that case. See 199 Fed. Appx. at 554.

[6] *S-L-L-* was the BIA decision that the Second Circuit reviewed in *Lin*.

The Attorney General instructed the parties to submit briefs addressing

> all relevant statutory questions including, but not limited to, whether IIRIRA § 601(a), codified at 8 U.S.C. § 1101(a)(42), is ambiguous or silent on the availability of refugee status for spouses or partners of individuals who have been subjected to forced abortion or sterilization, and whether the BIA interpretation of Section 601(a) set forth in *Matter of C-Y-Z-*, 21 I. & N. Dec. 915 (BIA 1997) (en banc), and *Matter of S-L-L-*, 24 I. & N. Dec. 1 (2006) (en banc) is correct.

Att'y Gen. Order No. 2905-2007, at 1 (Sept. 4, 2007).

The Attorney General therefore has undertaken to reexamine the Department's position with respect to whether a person who has not personally suffered a forced abortion or sterilization may automatically obtain asylum on the basis of his or her partner's persecution. The facts of *Shi* are different from this case, in that the applicant in *Shi* was legally married to the person arguably subject to coercive population control measures. See *In re Shi*, No. 95 476 611 (Immigr. Ct. Nov. 8, 2004), slip op. 4-6. Nonetheless, the Attorney General's resolution of *Shi* may impact this case. The plain text of the statute does not mention spouses, and the spousal eligibility rule has been long understood to be a permissible, but not required, interpretation of the statute. See Pet. App. 11a-12a. If the Attorney General modifies the agency's position, then courts will be required to consider whether the new position is entitled to deference.[7]

---

[7] Contrary to petitioner's assertion (Pet. 19-20), neither the Seventh Circuit nor the Ninth Circuit has held that the plain language of the statute compels the conclusion that a person who participates in a

This Court thus should decline to consider the question presented at this time.

3. Even if the question presented otherwise warranted review at this point in time, this case would not be a suitable vehicle for doing so, because petitioner has failed to establish that he participated in a traditional marriage ceremony. The IJ made extensive credibility findings, noting that petitioner was not at all "convincing" or "believable" and that he "change[d] his story as he went along, when he was confronted with inconsistencies and the answers he had already given to questions." Pet. App. 55a-56a. The IJ thus found that, as a factual matter, petitioner "failed * * * to prove that he and this person he describes as his wife entered into a traditional marriage." *Id.* at 53a.

The BIA did not disturb or address the IJ's factual finding that petitioner did not participate in a traditional marriage ceremony, because it held that petitioner could not in any event establish asylum eligibility on the basis of the involuntary abortion "of a woman that he claims he married in a traditional marriage ceremony." Pet. App. 36a. That factual finding, however, may only be overturned by the BIA if it is "clearly erroneous," 8 C.F.R. 1003.1(d)(3)(i), that is, if the BIA has "the definite and firm conviction that a mistake has been committed," *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Moreover, that factual finding must be upheld by the court of appeals as long as it is

---

traditional marriage ceremony is automatically deemed to have been persecuted if the other participant is thereafter subjected to a coercive population control practice. See pp. 15-16, *supra*. The courts therefore will be required to assess whether whatever interpretation the Attorney General renders is entitled to deference. See *Brand X*, 545 U.S. at 982-983; *Aguirre-Aguirre*, 526 U.S. at 424-425.

supported by substantial evidence, *Elias- Zacarias*, 502 U.S. at 481, meaning that the IJ's finding is "conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary," 8 U.S.C. 1252(b)(4)(B). Petitioner cannot establish clear error or a lack of substantial evidence in light of the numerous inconsistencies in his testimony, including the fact that he originally told immigration officials that he was "single," then later claimed that he participated in a traditional marriage ceremony. See Pet. App. 53a. Under these circumstances, further review of the question presented is unwarranted because it would not affect the outcome in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
DONALD E. KEENER
SONG E. PARK
Attorneys

APRIL 2008